In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1658

JOHN MAGAFAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals (Pet. App. A1-A2) was entered without an opinion. The opinion of the Board of Immigration Appeals (Pet. App. A3-A7) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1971. A petition for rehearing was denied on March 1, 1971. On April 30, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Attorney General was authorized by Congress to declare a nonimmigrant alien in transit without visa ineligible for an adjustment of status under Section 245 of the Immigration and Nationality Act.

2. Whether the Special Inquiry Officer had the power to alter petitioner's classification *nunc pro tunc* from transit without visa to nonimmigrant visitor.

STATUTE AND REGULATION INVOLVED

Section 245(a) of the Immigration and Nationality Act (8 U.S.C. 1255(a)) provides that:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

8 C.F.R. 214.2 provides in relevant part that:

> The general requirements in § 214.1 are modified for the following nonimmigrant classes:
>
> * * * *

(c) *Transits*—(1) *Without visas.* An applicant for admission under the transit without visa privilege must establish that he is admissible under the immigration laws; that he has confirmed and onward reservations to at least the next country beyond the United States, and that his departure from the United States will be accomplished within ten calendar days after his arrival * * *. * * * The privilege of transit without a visa may be authorized only under the conditions that the carrier, without the prior consent of the service, will not refund the ticket which was presented to the Service as evidence of the alien's confirmed and onward reservation, that the alien will not apply for extension of temporary stay or for adjustment of status under section 245 of the Act, and that at all times he is not aboard an aircraft which is in flight through the United States he shall be in the custody directed by the district director.

STATEMENT

The essential facts are not in dispute. Petitioner, a Greek national, entered this country on October 20, 1968, as a nonimmigrant alien without a visa in immediate and continuous transit through the United States. Although he had never worked on a ship, he was allegedly en route from Greece to Miami, Florida, where he was to board a Greek vessel as a seaman. He was to remain in this country for one day, until October 21, 1968.

Upon his arrival in New York, petitioner claims that he was met at the airport by his American brothers and told that his mother, who was already

in this country, was very ill. His story is that he thus went with his brothers to his mother's side rather than proceeding on to Miami, Florida (Pet. 4).

Some three months later, on January 20, 1969, petitioner sought to obtain an adjustment of status to permanent residence pursuant to Section 245 of the Immigration and Nationality Act, 18 U.S.C. 1255. The District Director rejected the application on the ground that, as a visitor in transit without visa, petitioner was precluded by the terms of 8 C.F.R. 214.2(c)(1)[1] from applying for that form of relief (Pet. App. A5).

On July 2, 1969, petitioner was ordered to show cause why he should not be deported. A hearing was held on September 10, 1969, during which he again applied for an adjustment of status. The Special Inquiry Officer (Pet. App. A7-A10) found him ineligible for such relief but granted him the option of voluntary departure in lieu of deportation. Petitioner then took an appeal to the Board of Immigration Appeals; on May 12, 1970, the Board, relying on its earlier decision in *Matter of Davis*, 10 I & N Dec. 441 (BIA 1964), held that petitioner was not entitled to an adjustment of status (Pet. App. A3-A7). The United States Court of Appeals for the District of Columbia Circuit affirmed *per curiam*

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[1] The regulation provides in pertinent part as follows: "The privilege of transit without a visa may be authorized only under the conditions * * * that the alien will not apply for extension of temporary stay or for adjustment of status under section 245 of the Act * * *."

(Pet. App. A1-A2), and denied a petition for rehearing (Pet. App. A2-A3).

ARGUMENT

1. Petitioner concedes that he entered this country as an alien without a visa for "immediate and continuous transit through the United States" under Section 101(a)(15)(C) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(C), and that he violated a condition of his entry by remaining here beyond the one-day period allotted to him for transit to Miami, Florida. He contends, however, that the summary rejection of his Section 245 application for adjustment of status was unjustified. Specifically, he urges that the regulation barring his application, 8 C.F.R. 214.2(c)(1), relates solely to Section 214 of the Act (8 U.S.C. 1184), which authorizes the Attorney General to prescribe conditions to the admission of any alien, and thus does not foreclose applications for adjustment to permanent residence status under the separate statutory provisions of Section 245. Such an interpretation would, he argues further, be contrary to the intent of Congress, which specifically excluded other classes of aliens from eligibility for Section 245 relief, but did not exclude aliens in transit without a visa.

a. The fact that aliens in transit are barred from applying for adjustment of status by a regulation promulgated under Section 214 of the statute does not thereby make the regulation inapplicable to such aliens seeking permanent residence under Section 245. Section 214(a) (8 U.S.C. 1184(a)) provides:

> The admission to the United States of any alien as nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe * * *.

The general rule, as expressed in Section 212(a)(26) of the Act (8 U.S.C. 1182(a)(26)), is that nonimmigrants are excludable unless they possess a visa and passport. Pursuant to Section 212(d)(4)(C) (8 U.S.C. 1182 (d)(4)(C)), however, Congress has authorized the Attorney General and the Secretary of State, acting jointly, to waive the visa and passport requirements in the case of aliens "in immediate and continuous transit through the United States." In exercising this authority, the Attorney General chose to admit such aliens on the condition that they not be eligible to apply for adjustment of status under Section 245. As the Second Circuit recently held in *Fook Hong Mak* v. *Immigration and Naturalization Service*, 435 F.2d 728, 731 (Pet. App. A16), that determination "was reasonably related to the statutory scheme." Having once imposed the condition in 8 C.F.R. 214.2(c)(1), the Attorney General was not required to repeat it in another part of the regulations before it could take effect. See *La Franca* v. *Immigration and Naturalization Service*, 433 F. 2d 992 (C.A. 2); *Tomasello* v. *Rogers*, 306 F. Supp. 705 (S.D. N.Y.).

b. Nor is there any substance to petitioner's contention that this conclusion is contrary to the intent of Congress. The answer to this argument was given by the Second Circuit in *Fook Hong Mak* (Pet. App. A17): "* * * it is fallacious to reason

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that because Congress *prevented* the A avor of those
eral from exercising any discretion in f have abused
groups, which Congress had found to t to *require*
the privileges accorded them, it mean se on a case-
him to exercise it in favor of everyone e convince him
by-case basis even if experience should similar po-
of the existence of another group with emphasis in
tentialities or actualities of abuse" (ntrary, Sec-
original; footnotes omitted).[2] To the c he "Attorney
tion 245 in specific terms delegates to t such regula-
General, in his discretion and under 1255), ex-
tions as he may prescribe" (8 U.S.C. es of aliens
plicit authority to treat additional clas s chosen to
in the same manner that Congress ha y exclusion,
treat those groups within the statutor e categories
if he determines that there are "som dividualized
* * * susceptible to handling on a less in n and Nat-
basis." *Fook Hong Mak* v. *Immigratio uralization Service, supra* (Pet. App. A17). See
generally 8 C.F.R. 245.1(a) (alien who has been
allocated an immigrant visa number); 8 C.F.R.
245.1(b) (exchange alien); and see *Gambino* v. *Immigration and Naturalization Service,* 419 F. 2d
1355 (C.A. 2), certiorari denied, 399 U.S. 941; *Tuazon* v. *Immigration and Naturalization Service,* 389
F. 2d 363 (C.A. 7). And, as explained in *Fook Hong
Mak* (Pet. App. A16), it was not unrea sonable for

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[2] Section 245 specifically excludes two clas es of aliens from eligibility for adjustment of status unde that provision—alien crewmen and aliens who are na tives of any country of the Western Hemisphere or any ad jacent island named in Section 101(b)(5), 8 U.S.C. 1101(b) 5).

the Attorney General to conclude that aliens in transit without visa constitute such a category. Thus, for him to declare this group ineligible for Section 245 relief is a valid exercise of his authority.

2. Petitioner's additional contention that the Special Inquiry Officer and the Board of Immigration Appeals had authority to waive possession of a visitor's visa and to admit petitioner as a visitor *nunc pro tunc* is without merit. Section 248 of the Act (8 U.S.C. 1258), which governs changes of nonimmigrant classifications, expressly forbids changing the classification of "* * * an alien classified as a nonimmigrant under paragraph 15(C) ["aliens in immediate and continuous transit through the United States"] * * * of section 1101(a) of this title."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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